

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51

**REPLY COMMENTS OF AMEREN SERVICES COMPANY
AND
VIRGINIA ELECTRIC AND POWER COMPANY**

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SUMMARY

In the recently released Report on a Rural Broadband Strategy, then Acting Chairman Michael Copps stated that “timely and reasonably priced access to poles” is critical to broadband buildout. *Ameren and Dominion believe there is a third critical factor, namely, reliability of the supporting infrastructure.*

The supporting infrastructure – poles, mostly – are subject to long-term wear and tear as well as sporadic, catastrophic events such as severe weather, accidental damage or even deliberate attacks. The Commission’s national broadband plan must *anticipate* those conditions and reasonably allow for an infrastructure that is able to suitably perform throughout those conditions. The way to do this is by adopting a national broadband plan that rewards broadband providers and pole owners that cooperate and work together in an **infrastructure partnership**.

The essence of the infrastructure partnership is that the pole owner understands and accommodates the requirements of the broadband provider and the broadband provider abides by reasonable standards and processes and fairly compensates the pole owner in proportion to the space occupied and the benefit derived by the attached facilities.

Many commenters who addressed the pole attachment aspects of this proceeding used the occasion to re-hash gripes that they raised in the co-pending pole attachment rulemaking in WC Docket No. 07-245. Ameren and Dominion show within that many of the issues raised, such as the broadband rental rate methodology, are best resolved on the record in that proceeding, not here. Ameren and Dominion counsel against seeking legislative revisions to Section 224 of *Communications Act*, in order to expand the universe of entities with attachment rights or to expand the facilities to which entities may seek attachment. Ameren and Dominion counsel against adopting hard-and-fast regulations to apply to circumstances that have historically been

shown not to be amenable to one-size-fits all regulation, such as construction standards and deadlines and access to pole tops by wireless carriers, but instead to continue to rely on good-faith negotiations, backed up the by the Commission's existing complaint processes.

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Ameren Services Company (“Ameren”),¹ and Virginia Electric and Power Company, doing business in Virginia and North Carolina, respectively, as Dominion Virginia Power and Dominion North Carolina Power (“Dominion”),² respectfully submit these reply comments in this proceeding.

INTRODUCTION

Paragraph 50 of the Notice of Inquiry³ in this national broadband plan proceeding poses the following question:

More generally, to what extent do tower siting, pole attachments, backhaul costs, cable franchising and rights of way issues, as well as others, stand as impediments to further broadband deployments where such deployments would be made by market participants in the absence of any government-funded programs?

Several commenters addressed the pole attachments aspect of this inquiry. Mostly they used the occasion to re-hash arguments that they raised in the comments and reply comments

¹ Ameren Services Company is a service subsidiary of Ameren Corporation. It is filing these comments on behalf of four utility operating subsidiaries of Ameren Corporation (Union Electric Company d/b/a AmerenUE, Central Illinois Light Company d/b/a AmerenCILCO, Illinois Power Company d/b/a AmerenIP and Central Illinois Public Service Company d/b/a AmerenCIPS). These utility operating companies provide electric power service to over 2.3 million customers throughout a 64,000 square mile service territory in Missouri and Illinois. Ameren has over 9,000 employees.

² Dominion provides service to over 2.4 million electric customers in Virginia and North Carolina, who are reached by over 54,000 miles of distribution lines. Dominion employs over 7,100 people.

³ *A National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd 4342 (2009).

that they filed in the Pole Attachments Rulemaking in WC Docket No. 07-245.⁴ Inasmuch as most of these arguments have already been rebutted in that proceeding, Ameren and Dominion will keep their replies here to those arguments to a minimum.

BACKGROUND

On May 22, 2009, then Acting Chairman Michael Copps issued his Report on a Rural Broadband Strategy in GN Docket 09-29.⁵ At paragraph 8 of that Report, Acting Chairman Copps stated, “I view this Report as a prelude to, and a building block for, the national broadband plan....” In paragraph 157 of the Report, the Acting Chairman made it clear that the national broadband plan and the Rural Broadband Strategy are closely related to the also-pending Pole Attachments Rulemaking, in which the Commission proposed that pole attachments used to provide broadband Internet access services should be subject to a single rate formula, regardless of the nature of the company providing those services. In paragraph 157, the then Acting Chairman stated that “timely and reasonably priced access to poles” is critical to broadband buildout.

Ameren and Dominion argued in their comments in this proceeding that there is a third critical factor, namely, infrastructure reliability. In developing its national broadband plan, the Commission must look beyond the buildout phase and adopt a policy that is intended to keep the built-out facilities safely in place and functioning through long-term wear and tear and through sporadic, catastrophic events such as severe weather, accidental destruction and even deliberate attacks. Broadband service is important to have in normal circumstances; it may be critical to have, however, in emergency conditions. Electric utilities already anticipate those

⁴ *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007).

⁵ Found at <http://wireless.fcc.gov/outreach/ruralbroadband>.

conditions. Industry safety and construction codes and utility construction manuals attempt to strike the right balance between creating a rugged infrastructure and the cost of that infrastructure. The Commission's national broadband plan should follow suit and support these construction standards and practices, not weaken them.

Predictably, most of the attaching entities, or would-be attaching entities, who addressed the pole attachments issues, focused on attaining access rights to which they are not entitled, or on speeding up broadband buildout, as though broadband buildout in the United States were somehow stalled. Yet Ameren and Dominion showed in their comments that broadband buildout in the United States has been extensive.

The Commission's Fifth Report to Congress on Broadband Deployment⁶ concludes, at paragraph 59, that "the deployment of advanced telecommunications capability to all Americans is reasonable and timely." At paragraph 60, citing a Pew Broadband Adoption Study, the Commission noted that as of early 2007, forty-seven percent (47%) of all adult Americans have a broadband connection at home and that, in rural areas, home broadband adoption stood at thirty-one percent (31%). Summarizing the data in Appendix B of the Fifth Report, the Commission said that "more than 99% of the country's population lives in the more than 99% of Zip Codes where a provider reports having at least one high-speed service subscriber."

A more recent Pew study⁷ – the same study cited in footnote 45 of the then Acting Chairman's Report on a Rural Broadband Strategy – notes that the percentage of Americans reporting having a high-speed Internet connection at home is now up to fifty-five percent (55%).

⁶ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 23 FCC Rcd 9615 (June 12, 2008).

⁷ Pew Internet & American Life Project, *Home Broadband Adoption 2008*, available at http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Broadband_2008.pdf, last visited June 2, 2009.

The Pew study found that broadband service rates in April 2008 were four percent (4%) lower than in December, 2005. According to the Pew study, only ten percent (10%) of American adults say they use dial-up Internet connections at home, although sixty percent (60%) of dial-up users say they are not interested in broadband.

The Commission's study and the Pew studies show that broadband deployment is proceeding apace. In fact, as the Pew studies show, broadband uptake is not merely a function of the availability of built-out infrastructure but also a function of age, ethnicity, educational attainment, household income, community type, online behavior and several other factors. The argument that electric utility pole attachment policies and practices need to be reformed by the Commission in order to promote broadband deployment is simply not supported by these studies that show the extent of broadband deployment that has taken place to date under the electric utilities' current policies and practices.

The Commission does not need studies to know intuitively that reliability of the infrastructure is as important as infrastructure build-out. These are two, equally important, sides of the broadband infrastructure equation. Just as electric utilities must recognize their role in accommodating broadband deployment, broadband service providers must recognize their responsibility to the safety and reliability of the infrastructure that supports critical electric, telecommunications and broadband services. *Any national broadband plan must include electric utilities as willing participants in broadband deployment and broadband service providers as willing participants in the preservation of the reliability of the supporting infrastructure.*

There are no shortcuts to achieving broadband infrastructure reliability. Commenters who re-hashed gripes about the speed of pole attachment permit processing or make-ready

construction merely perpetuate the climate of controversy and confrontation for the sake of near-term, slap-dash deployment and hoped-for customer profits. The policies laid out by Ameren and Dominion in their comments in this proceeding go beyond the build-out phase and lay out fundamental requirements necessary to the preservation of a well-constructed, supporting infrastructure and, consequently, the reliability of the broadband service to which customers subscribe.

COMMENTS

I. The Pole Attachment Rental Rate for Broadband Attachments Should Be Determined in WC Docket No. 07-245

The Commission's pole attachment policies are but one small – almost minuscule – aspect of this broadband proceeding. To both the pole-owning and pole-attaching sides of the equation, however, there is perhaps no more important issue than the question of the applicable pole attachment rental rate formula. That issue should not be decided in this proceeding, where its importance is hardly noticeable, when there is an open Commission proceeding in WC Docket No. 07-245, where its importance is reflected and a comprehensive record has been developed.

In the present proceeding, the Commission has focused on what must be done to remove impediments to and promote widespread and inexpensive deployment of broadband service. Seizing on this objective, the attaching community has set before the Commission the superficially attractive proposition that the lowest possible pole attachment rental rate will best conduce to widespread broadband deployment.⁸

⁸ CTIA – The Wireless Association comments, p. 20 (The FCC should “set a unified rate for all providers capable of providing broadband service, which rate should be as low as possible for electric utilities to receive just compensation.”) and p. 22 (“the unified rate should be set at the lower default Cable Rate.”) National Cable & Telecommunications Association comments, pp. 34-5 (“...all broadband providers [should] pay rates established under the existing cable rate formula.”) Time Warner Cable Inc. comments, p. 24 (Low rates spur broadband

Ameren and Dominion urge the Commission to resist this facile argument and defer instead to the proceeding with the extensive record on the question. An artificially low rate, based on nothing more than the policy assertion that “lower is better” will not result in a resolution of the deep-seated positions of the parties and certainly will not constitute a meaningful step toward long-term reliability of the electric/broadband supporting infrastructure. For this to occur, the broadband rate must capture a fair share of all of the costs associated with the pole and distribute those costs in approximation and proportion to the space used by each attaching entity as well as the benefit that each entity derives from the entire pole. The record that reflects the best way to accomplish this has been developed in WC Docket No. 07-245.

II. Wireless Attachments Present Unique Issues That Cannot Be Adequately Addressed in Universal Rules

Several commenters⁹ seek rulings that wireless telecommunications carriers not only have access rights to the poles (a question that has already been resolved by the Supreme Court, see footnote 14) but also access rights to the *tops* of poles. This, however, is a question that is best left to the good-faith negotiations between the host electric utility and the wireless carrier, rather than being covered in a hard-and-fast FCC regulation.

Placement of an antenna at the top of the pole involves the some or all of the following considerations:

- The top of the pole may already be occupied by the electric utility’s ground wire;
- Installing, maintaining or repairing an antenna at the top of the pole places the worker in proximity to energized electric power lines, which are also near the top of the pole, when normally the communications worker, working in the lower, “communications space” on

deployment. FCC should set the “unified” broadband rate at the cable rate for cable and CLEC providers.) Unless stated otherwise, all comments referenced in these reply comments were filed on June 8, 2009.

⁹ For example, CTIA – The Wireless Association, comments p.22.

the pole, is separated from the energized lines by the 40-inch “safety space;”

- The geographic service area may be prone to hurricanes. Antennas installed at the top of the pole can cause higher “moments of inertia” or stress forces to be applied to the pole during a hurricane than the stress forces for which the pole was engineered for electric distribution service; and
- The pole attachment rental formula applicable to pole-top antenna attachments may not capture all of the costs associated with the wireless carrier’s use of virtually the entire pole to support its antenna.

Suggestions to set a hard-and-fast regulation regarding pole top access are intended to eliminate these very real considerations from good-faith bargaining. Yet good-faith bargaining has resulted in deployment of pole-top antennas on many electric distribution poles. Good-faith bargaining, backed up by recourse to the Commission’s existing pole attachment complaint process, remains the best way to address this complicated question.

III. Artificial Deadlines and Restrictions on Construction Standards Are Inimical to Infrastructure Reliability and Applicable Commission Precedent

Ameren and Dominion caution that broadband deployment must be concurrent with equally strong support by all stakeholders for preservation of the reliability of the utility supporting infrastructure. As former Chairman Martin counseled, “Pole attachments provide an important means for the deployment of broadband and other services to Americans. However, the safety and reliability of critical electric infrastructure is a paramount concern.”¹⁰

The Commission’s national broadband plan should rest upon the premise that the interests of all users of that infrastructure are, or should be, aligned. Electric utilities and

¹⁰ Statement of Chairman Kevin J. Martin associated with the Notice of Proposed Rulemaking in WC Docket No. 07-245.

communications companies alike need a safe, sound and reliable infrastructure to support their facilities. Failures of electricity and communications networks in major disasters, and in more commonplace weather events such as ice storms and wind storms, serve as a constant reminder of the vitally important role of the pole and conduit infrastructure in supporting the delivery of electric and communication services.

The Commission should allay the tension between the two industries and ensure the long-term success of its national broadband plan by encouraging – even requiring – the parties to work toward a true infrastructure partnership. An infrastructure partnership concept was laid out in Ameren and Dominion’s comments in this proceeding. Infrastructure partnership also was promoted in the joint comments of the Utilities Telecom Council and the Edison Electric Institute, pp. 16-18.

Contrary to the short-sighted arguments of some commenters,¹¹ pole safety and reliability standards will legitimately vary from utility to utility and from locale to locale. These variations are not arbitrary but are the result of decades of experience with the local weather conditions and construction practices.

National safety and construction codes are important, but, as the Commission recognized twelve years ago, following enactment of the *Telecommunications Act of 1996*, it is unwise policy – folly, in fact – to attempt to dictate universally-applicable standards. As the Commission realized in 1996, **“Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall**

¹¹ CTIA – The Wireless Association comments, p. 24 (the Commission should prohibit electric utilities from establishing technical standards on top of those in place at EPA, OSHA or established by the NESC); PCIA – The Wireless Infrastructure Association and DAS Forum comments, p 7 (the Commission should establish that attachments that meet NESC/OSHA guidelines are safe); T-Mobile USA, Inc. comments, p. 23 (the Commission must establish uniform safety standards to prevent pole owners from applying subjective standards that unreasonably limit access to poles.)

we.”¹² The Commission’s national broadband plan should never seek to lessen construction standards and diminish long-term infrastructure reliability in the name of facilitating short-term broadband buildout.

Maintaining the soundness, safety and reliability of the infrastructure is in the best interests of all concerned, including electric utilities and cable and telecommunications franchisees, which depend on the infrastructure physically to support their plant; the customers, who expect uninterrupted delivery of electricity, telephone service, video programming and broadband service; and the nation itself, which depends on these networks for security, information and coordination of public safety and civil defense activities, especially in the most

¹² In the *Local Competition Order*, 11 FCC Rcd 15499 (1996), the Commission observed, at paragraphs 1147 – 1149: “Despite this specificity, the introduction to the NESC states that the code ‘is not intended as a design specification or an instruction manual.’ Indeed, utilities typically impose requirements more stringent than those prescribed by NESC and other industry codes. In some cases stricter requirements and restrictions are dictated by federal, state, or local law. Potentially applicable federal regulations include rules promulgated by the Federal Energy Regulatory Commission (“FERC”) and by the Occupational Safety and Health Administration (“OSHA”). Various restrictions can apply at the state level as well. Some local requirements governing zoning, aesthetics, or road clearances impose more stringent or more specific requirements than those of the national industry codes or of federal or state law.

“In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise. A utility’s individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions. As Duquesne notes, the provision of electricity is the result of varied engineering factors that continue to evolve. Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards. In addition, increasing competition in the provision of electricity is forcing electric utilities to engineer their systems more precisely, in a way that is tailored to meet the specific needs of the electric company and its customers. As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences.

“The record contains numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments. Extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility’s safety and engineering practices. In some instances, machinery used by local industries requires higher than normal clearances. Particular utility work methods and equipment may require specific separations between attachments and may restrict the height of the poles that a utility will use. The installation and maintenance of underground facilities raise distinct safety and reliability concerns. It is important that such variables be taken into account when drafting pole attachment agreements and considering an individual attachment request. The number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements. Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we.” (Footnotes omitted.)

difficult and threatening of circumstances.

Proposed time limits for make-ready construction¹³ are similarly unworkable. Construction is complicated and varies from circumstance to circumstance. Often existing electric plant and existing attachments on the poles must be rearranged. Construction demands relating to the utility's core electric distribution business may have higher priority. Plant restoration following a storm may divert construction assets. It is simply unreasonable to subject the pole owner to regulatory complaints and possible sanctions based on one-size-fits-all time limits that do not allow for extenuating circumstances. A rule of reason, backed up with recourse to the Commission under existing complaint procedures, remains the best solution to assure timely, yet reasonable, completion of make-ready construction.

The national broadband plan should adopt an infrastructure partnership policy that requires that every pole be engineered and properly prepared to receive attachments without jeopardizing the integrity of the pole; that the pole and conduit plant be regularly inspected and maintained for the benefit of all who use it; that broadband providers that have entered into pole attachment agreements with pole-owning utilities not make any attachments except in accordance with a permit issued pursuant to the pole attachment agreement; that all facilities, whether owned by a broadband provider or pole owner, comply with and be installed in accordance with the National Electrical Safety Code, state and local safety codes, and with the written construction practices of the pole-owning utility; and that host electric utilities accommodate the deployment requirements of attaching entities, including their need for prompt permit processing and make ready construction.

¹³ See, e.g., comments of PCIA – The Wireless Infrastructure Association and DAS Forum, p. 7; and comments of T-Mobile USA, Inc., p. 23.

IV. Revisions to Section 224 Would Be Ill-Advised

Provisions of the existing law governing pole attachments, 47 U.S.C. § 224, have been tested, some all the way to the Supreme Court, over the past 30 years and are now well settled.¹⁴ The rulings of the Supreme Court and U.S. Courts of Appeals are now accepted – some grudgingly, perhaps, but accepted nonetheless. Some entities, however, do not like the outcomes and recommend that the Commission seek legislative changes to the law as part of its national broadband plan.¹⁵ Nothing could more upset progress toward equilibrium between the attaching community and the pole-owning community and undermine a national broadband plan, than disturbing now its precedents.

FiberTower, for example, thinks it would be beneficial to “refresh Section 224” to expand access rights to include all “non-ILEC providers of lawful electronic communications services,” rather than only cable television systems or non-ILEC telecommunications carriers, and to expand facilities that are subject to attachment to include transmission facilities.

(FiberTower comments, p.13.) The fact is, however, that Section 224 *was refreshed* by the *Telecommunications Act of 1996*.

Similarly, FiberTower urges the Commission to seek legislation that would remove the “insufficient capacity” exception to access requirements in Section 224 (comments p. 16). Not only has this issue been litigated and resolved in *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002), but implementation of this revision would be extraordinarily burdensome on electric

¹⁴ See, e.g., *National Cable and Telecommunications Association, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) (ruling on access rights and wireless equipment).

¹⁵ FiberTower Corporation comments, p. 16, (the FCC should encourage Congress to remove the reference to “insufficient capacity” in Section 224(f)(2)); p. 13, (Section 224 should be clarified to apply expressly to electric transmission structures); and also p. 13, (Section 224 protections should be expanded beyond cable television systems or non-ILEC telecommunications carriers to include non-ILEC providers of “lawful electronic communications services”). Wireless Internet Service Providers Association comments, p 21, (the FCC should ask Congress to extend pole attachment access rights to broadband providers, giving them the same access rights as cable television systems and providers of telecommunications services).

utilities, who would face innumerable requests for pole replacements for reasons utterly unrelated to their core business of electric power distribution. It would turn the infrastructure picture completely on its head, making the requirements of the third-party attachers superior to the core business needs of the pole-owning utility.

The modifications to Section 224 enacted in 1996 have been tried and tested in several courts and apply to the circumstances with which FiberTower and others, such as the Wireless Internet Service Providers Association (comments, p. 21), now happen to disagree. Their disagreement is no reason, however, to inject turmoil into an environment that is very close now to an atmosphere of cooperation.

SUMMARY AND CONCLUSION

For the reasons set forth above, the Commission in this proceeding should: (a) defer ruling here on the question of the applicable broadband rate methodology and reach its decision based on the extensive record developed in the co-pending WC Docket No. 07-245, resisting the facile argument that the lowest justifiable rate is the best way to promote broadband deployment; (b) leave wireless carriers' access to pole top locations to good-faith negotiations between the carrier and the pole-owning utility; (c) avoid the impossible task of setting artificial construction deadlines or restrictions on construction standards and continue to rely on a rule of reason; and (d) resist seeking modifications to Section 224 of the *Communications Act* that would only rekindle controversy and restart an already comprehensive judicial review process.

Ameren and Dominion have shown in their initial comments and in these reply comments

that an *infrastructure partnership*, requiring both broadband providers and infrastructure owners to acknowledge the needs of the other and to cooperate for their mutual, long-term success, is the approach that should be adopted in the Commission's national broadband plan.

Respectfully submitted,

A handwritten signature in black ink, reading "Raymond A. Kowalski". The signature is fluid and cursive, with a prominent initial 'R' and 'K'.

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